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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent,

On Petition for Writ of Certiorari to The Ninth Circuit Court of Appeals

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BRIEF OF
SOUTHEASTERN LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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September, 1996

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Respondent,

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

COMES NOW the Southeastern Legal Foundation, Inc., in interest as *amicus curiae*, and petitions this Court for leave to file a brief *amicus curiae* in support of Petitioner's Petition for Writ of Certiorari before this Court.

The consent of the parties has been requested, and such consent has been denied by counsel for Respondent Tahoe Regional Planning Agency, in a letter dated August 27, 1996 to general counsel for the Southeastern Legal Foundation, Inc., which states in part, "It is our position that the filing of an amicus curiae brief on behalf of the

Southeastern Legal Foundation, Inc. will not assist the Court in resolving this matter."

The Southeastern Legal Foundation, Inc. appeared before this Court as *amicus curiae* in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in which this Court finally acknowledged the principle under the fifth amendment to the Constitution of the United States that owners of private property must receive just compensation for the use and enjoyment of their land when a government entity completely destroys through regulation such use and enjoyment.

The Southeastern Legal Foundation, Inc. petitions this Court to grant leave for the submission of a brief *amicus curiae* to highlight application of the Court's decision in *Lucas* to the facts presented in the instant case, and to emphasize the constitutionally fundamental equivalency of private property rights with all other civil rights that define the contours of individual freedom.

This 9th day of September, 1996.

Respectfully submitted,

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Attorney for *Amicus*

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THIS COURT SHOULD GRANT PETITION FOR WRIT OF CERTIORARI TO DECIDE IF THE FINAL DECISION DOCTRINE WAS PROPERLY APPLIED TO THE CASE BELOW . . . 4

II THIS COURT SHOULD APPLY THE PER SE TAKINGS RULE ESTABLISHED IN *LUCAS* TO THE PRESENT CASE 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Carpenter v. Tahoe Regional Planning Agency, 804 F. Supp. 1316 (D. Nev. 1992) . . . 6, 7

Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309 (1994) 2

First Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 6

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992) . . 2, 3, 4, 7, 8

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 9

Northeastern Florida Contractors v. City of Jacksonville, 508 U.S. 656, 113 S.Ct. 2297 (1993) 2

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 8

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 911 F.2d 1331 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991) . . . 6

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) . . 2, 3, 6, 7

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INTEREST OF THE AMICUS

The Southeastern Legal Foundation, Inc. ("Foundation") submits its brief as *amicus curiae* in this case. The Respondents in this case have not consented to the filing of this brief, and the Foundation has moved this Court for leave to file this brief.

The Foundation is a non-profit public interest law firm which advocates limited government, individual economic freedom, private

property rights, and the free enterprise system. The Foundation's function is to engage in litigation in support of these principles, and to oppose government abuse of authority at all levels. In the course of carrying out this mission, the Foundation provides direct legal representation to parties in civil litigation, and files *amicus curiae* briefs in selected cases, where important public policy issues are presented. The Foundation appeared as counsel of record in this Court for the petititoner in *Northeastern Florida Contractors v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297 (1993), and has appeared as *amicus curiae* in numerous cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

As an advocate for individual economic freedom and private property rights, Southeastern presents the views of its supporters who believe that such individual rights should be protected against governmental intrusion. The Foundation believes that the decision of the United States Court of Appeals for the Ninth Circuit in this case constitutes a failure to protect private property rights and a departure from this Court's precedents as enunciated in *Lucas*. The Foundation believes this case provides an opportunity for examination of the extent to which the Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) has been exploited by governments to evade constitutional imperatives.

STATEMENT OF THE CASE

Amicus Foundation adopts the statement of the case contained in the brief of the Petitioner.

SUMMARY OF THE ARGUMENT

The Tahoe Regional Planning Agency's denial of all practical, probable or even potential use and enjoyment of Mrs. Suitum's parcel of land violates this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in which this Court held that denial of all economically beneficial or productive use of land constitutes a compensible confiscation of private property under the fifth amendment to the Constitution of the United States.

Such denial of all use of private property, even for a short time, creates in a plaintiff a valid and ripe "takings" action regarding the period of time during which the "taking" occurred.

The Ninth Circuit misapplied the "final decision" ripeness doctrine articulated in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-94 (1985) by finding that Mrs. Suitum's potential "transfer" of development rights constituted a "use" of her property. Furthermore, under *Lucas*, a landowner whose palpable deprivation is one step short of annihilation may yet be entitled to relief based on analysis of the degree of economic impact of the regulation on the claimant and the extent to which such regulation has interfered with distinct investment-backed expectations of the owner.

ARGUMENT

I

THIS COURT SHOULD GRANT PETITION FOR WRIT OF CERTIORARI TO DECIDE IF THE FINAL DECISION DOCTRINE WAS PROPERLY APPLIED TO THE CASE BELOW

In 1972, Bernadine Suitum and her late husband acquired an 18,300 square foot parcel of land located in a developed residential subdivision in Incline Village, Nevada. They planned to use the lot for the simple purpose for which the property had always been appropriate, for which real property thoughout time has been employed, and, in fact, for which lots adjoining theirs had been used and developed for years.

The Tahoe Regional Planning Agency ("TRPA") has determined that Mrs. Suitum cannot develop her lot because the property is, in its estimation, a Stream Environment Zone, upon which no developmental disturbance is allowed by policy. The TRPA denied Mrs. Suitum's 1989 plan to develop a residence on the parcel. Such a denial of all use and enjoyment of her parcel of land clearly requires application of the principles enunciated by this Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), in which it was held that the denial of all economically beneficial or productive use of land is a compensible confiscation for purposes of the fifth amendment to the Constitution of the United States.

Yet, in a scheme which can at best be described as byzantine, the TRPA has attempted to circumvent the Takings Clause by conjuring for an undeterminable value certain "transferable development rights," or TDRs, which artificially displace the constitutional right to full use and enjoyment of private property -- the right to occupy the entire property, the right to build on that property, and the right to build on the property at a chosen time.

According to TRPA policy, each of these interests may be exercised only upon approval of the TRPA. In the case of Mrs. Suitum, these developmental interests must be "transfered," or sold, in their entirety because the TRPA has forbidden any development on her parcel. Of particular note, the three "property interests" artificially and disingenuously posited by the TRPA do not inhere naturally or logically in any parcel of land subject to TRPA jurisdiction. The Ninth Circuit has, in effect, equated private property rights with the chimerical right to vote in, say, Cuba, where exercise of the franchise turns upon the cheerful absence of choice. We refer to such injustice as a "right without a remedy," a legal lacuna abhorred by the Constitution, especially in matters concerning civil rights, of which private property ownership had been a neglected sibling until *Lucas*.

Despite the fact that the Ninth Circuit, in reviewing the decision of the District Court, found that Mrs. Suitum's development rights on the parcel were identifiable and had value, the court below required Mrs. Suitum to "cash in" on those rights by attempting to transfer them. The TRPA included the clever requirement that she apply for approval for the use of those rights by another landowner, thereby further and permanently severing from any legitimate expectational use and enjoyment the inherent and constitutionally sacrosanct nature of the right of private property ownership.

The holding below is troublesome. The courts below misapply the "final decision" ripeness doctrine espoused by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-94 (1985) in their denials of jurisdiction. Under *Williamson County*, a property owner does not have a ripe claim that a regulation of private property requires invocation of the Takings Clause until the owner has "obtained a final decision regarding how [she] will be allowed to develop [her] property." 473 U.S. at 190. The TRPA has enjoined Mrs. Suitum and, presumably, any future owner of the parcel of land in question, from development of the particular parcel of land.

Moreover, the TRPA's denial of the use and enjoyment of Mrs. Suitum's parcel of land may more readily be characterized at this juncture as a "temporary taking," in which a landowner is denied "all use of his property, [and such takings] are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Ninth Circuit took notice of this principle in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1334 (9th Cir 1990), *cert. denied*, 499 U.S. 943 (1991), stating in part, "if [an ordinance] . . . effected a taking, even for a short time, plaintiffs are entitled to just compensation for that temporary taking." In a similar case decided by the U.S. District Court for Nevada in 1992, the court held that the TRPA ordinances limiting the number of single-family dwelling permits and prescribing application procedures for same by property owners in the Tahoe basin may effect a "temporary taking," and, therefore, "so far as Plaintiff can allege a temporary taking, even for a very short period of time, she has a valid takings action." *Carpenter v. Tahoe Regional*

Planning Agency, 804 F. Supp. 1316, 1321 (D. Nev. 1992). That court held that the Plaintiff had a ripe takings claim for the time period that a challenged ordinance, which created a case-by-case review process for the issuance of dwelling permits somewhat similar to the present case, was in effect. 804 F. Supp. at 1323.

II

THIS COURT SHOULD APPLY THE PER SE TAKINGS RULE ESTABLISHED IN *LUCAS* TO THE PRESENT CASE

One of the problems with the Ninth Circuit's ruling in the instant case is that, for purposes of the *Williamson County* final decision ripeness doctrine, the court found that Mrs. Suitum's "transfer" of development rights would be a "use" of her property. This misapplication of the ripeness doctrine conflicts not only with this Court's definition of "use" of land as building on or development of the land itself, *Williamson County*, 473 U.S. at 190, but more importantly undermines this Court's decision in *Lucas* that regulatory denial of all beneficial or productive use of land is a violation of the Takings Clause of the fifth amendment to the Constitution of the United States. *Lucas*, 505 U.S. at 1015.

With regard to the Ninth Circuit's holding in the instant case that Mrs. Suitum's "use" of her property via the potential sale of certain rights derived from a small portion of "transferable" property may provide adequate compensation, it should be pointed out that Justice Scalia has noted

> . . .the fact that regulations that leave the owner of land without economically beneficial or productive options for its use - typically, as here, by requiring land to be left substantially in its natural state - carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Lucas, 505 U.S. at 1011-12. Furthermore, the regulatory "takings" formula identified in *Lucas* should apply to the instant case despite potential "benefits" that Mrs. Suitum might realize upon sale of her TDRs:

> [Such an] analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and. . .the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

Lucas, 505 U.S. at 1102, n. 8.

Here, the policy enacted by the TRPA, namely, the allocation of TDRs and the unlimited and perpetual governance thereof, has affected dramatically the economic value of Mrs. Suitum's parcel of

land and has interfered extensively with her distinct "investment-backed expectations" regarding the parcel of land. The potential and probably interminable inability of Mrs. Suitum to fulfill the legitimate and constitutionally protected expectation of home development on a parcel of privately owned land located in a residentially developed area, coupled with the illusory nature of the so-called "rights" contrived by, and utterly dependent upon, the discretion of the TRPA, constitutes a deprivation or confiscation of private property that cannot be condoned in this case without tacit endorsement of legislative ledgerdemaine. Such an endorsement is a clear abrogation of the dictate enshrined in *Lucas* and ensconced in our Constitution. As this Court has recognized, "The right to enjoy property . . . is, in truth, a 'personal' right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Deprivation of the right to enjoy property, whether through physical interference or regulatory machination, inflicts injury at the very moment of imposition, and should be redressed by this Court.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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